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AUTHOR Herbold, Paul E., Ed.
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ABSTRACT

The current status of the law concerning the right of persons not connected with school programs or activities to exercise their freedom of expression and assembly in the immediate vicinity of schools, insofar as they relate to picketing, leafletting, speech, and noise, may be summarized as follows. Classrooms and premises of public schools are under the control of the state, which has the power to regulate their use; interruptions of the educational process by outsiders may be prohibited; while peaceful picketing will be allowed, occupations of buildings to shut them down, the invasion of classrooms, and the deliberate making of noise that interferes with classes will not be permitted; school officials may specify under what conditions speakers, picketers, pamphleteers, or other demonstrators may function within a school building; persons seeking to exercise their rights to free speech or peaceable assembly prior to or after school hours in ways that are not actually or imminently violent may do so on public premises near school facilities; and, denial of access to school property by school authorities has usually been held to be permissible if the terms of denial are carefully and clearly drawn. (Author)

A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
1201 Sixteenth Street, N W
Washington, D C 20036

April 1973

Concerning

NON-STUDENT USE OF SCHOOL PROPERTY

Civil Liberties vs. Public Responsibility

To what extent can citizens exercise their civil liberties in, on, or near school property?

This is a question confronting many school administrators who are searching for the proper balance between their obligation to conduct educational programs in an orderly manner, without disturbance, and the exercise of constitutional liberties by citizens.

The issue should not be confused with the rights of students and teachers to exercise their First Amendment rights to free speech, publication, or assembly. There is, after all, a fundamental difference between the situation of persons involved in the schools's assigned functions and activities and that of other members of the community. This distinction has been clearly recognized by the courts and legislative bodies. Nevertheless, questions relating to the balancing of individual civil liberties and the public interest in education continue to arise and are of particular concern to school principals and other administrators.

Group and Organizational Use

Historically, school property is state property and cannot be used for any non-school purpose unless specifically authorized by the state legislature. Not even the school board can grant permission for non-school use of school property without statutory authorization.

The use of school property for non-school purposes varies from state to state, with Western states generally providing greater latitude than Eastern states. California, going further than any other state, provides by statute for wide use of school buildings for non-school purposes. In fact, California law establishes a "civic center" at "each and every public school building and grounds within the state." It further provides for the free use of these facilities by community groups for meetings to discuss subjects which, in the judgment of the school board, "appertain to the educational, political, economic, artistic, and moral interests of the

For review of the legal status of student civil liberties, see NASSP's Legal Memoranda on Dress Codes, Hair Styles, and Student Publications.

citizens." The local board is empowered to adopt "reasonable rules and regulations to carry out the mandate," but in no event can such use interfere with the regular purposes of the schools.

Cases in California and other states have usually involved politically radical and allegedly subversive organizations that have been refused the use of school buildings for public meetings. These cases properly belong in the larger class of freedom of speech and assembly. They do not merit special treatment just because they involve school property, unless they involve the use of school property during regular school hours and, therefore, pose a risk of disturbance to educational programs.

Generally, the state does not have an obligation to make school buildings available for public gatherings, but where provision is made for the use of school property by outside persons or organizations, the law has become quite clear that the authority must treat everyone in the same category alike. In a New York case [Ellis v. Allen, 4 A.D. 2d 343, 165 N.Y.S. 2d 624 (1957)] the court said that permission could be denied to an otherwise admissible group if evidence indicated that a clear and present danger existed for public disorder and that possible damage to the building would result from the proposed use. School authorities, however, would have to be able to prove a reasonable belief that such danger existed. An organization could not be barred simply because a school board, or even a segment of the public, might be hostile to the opinions or the program of the organization or its speakers, providing that these were not unlawful, per se.

Occasional exceptions to the general rule, shown in Ellis v. Allen, are noted, as in Declaration of Delaware Teachers v. De La Warr Board of Education, [335 F. Supp. 385 (1971)]. When an exclusive privilege was granted to one teachers' association, recognized by the school board as the exclusive negotiating group, to use school buildings for its activities, a second teachers' organization that was denied use of school facilities sued. The court upheld the school board on the basis that there was a compelling state interest in keeping the school and its grounds from becoming a labor battlefield. The limitation did not therefore violate the First or Fourteenth Amendments.

Many courts permit school authorities to limit the use of school buildings or other property on the basis of distinctions among types of users, if the classifications are reasonable. Long-term uses, for example, may be barred, while temporary or short-term uses are permitted. It also seems clear that certain kinds of uses can be totally barred, such as those with religious connotations. The Supreme Court of Pennsylvania, for example, upheld the right of a school board to refuse the use of a high school auditorium to a religious sect for a series of public talks on national and international affairs "from a Bible standpoint." The board had acted under a previously existing rule barring permits "to anyone for any religious or sectarian purpose." [McKnight v. Board of Education, 365 Pa. 442, 76 A. 2d 207 (1950).]

Informal Use by Individuals

Until fairly recently, use of public school property by individuals not acting on behalf of organizations or groups had not been an issue of any great importance, judging from the paucity of judicial cases reported. The few cases that did occur usually concerned disorderly or other annoying behavior which was treated as

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common law trespass. Even when political demonstrations, leafleting, and picketing became problems to school administrators, these activities were often treated in this way.

In State of New Jersey v. Karr, [291A, 2d 845 (1972)], for example, non-students who set up a card table on school property to distribute literature promoting an anti-war demonstration were convicted of trespass. The defendants appealed on the ground that their behavior was protected under the First Amendment, but the state appellate court upheld the conviction. The court said the public's right and need to have schools run without outside interference permitted a reasonable limitation in the First Amendment rights of non-students.

There is, indeed, some indication that school authorities have found themselves on firmer ground prosecuting non-students for common law trespass than they have trying to specifically prohibit disruptive conduct on school grounds by special legislation. In State of Wisconsin v. Mahoney [198 N.W. 2d 373 (1972)], for example, the Supreme Court of Wisconsin reversed the conviction of a person convicted of a misdemeanor under a statute that prohibited "any act in a public building or on public grounds which interferes with the peaceful conduct of activities normally carried on in such building or on such grounds." The court held that the terms "any act" and "proper official," whose command to leave was to be obeyed, were unconstitutionally vague and overly broad. While the facts of the case did not involve a school, the statute did define public buildings and grounds to include school property.

In the Maryland case of Kirstel v. State, [284 A, 2d 12 (1972)], however, the court upheld the conviction of a photographer seeking to set up a display of his pictures and address a crowd of students after he had been denied permission to do so and had been asked to leave. As in the Wisconsin case above, there was a Maryland statute rather broadly prohibiting non-student activity on school property. The court rejected the contention that the statute was too vague or that the defendant's rights of free speech and assembly were unconstitutionally abridged.

The Case of the "Sehome Eight"

Because of the uncertain state of judicial opinion in the various states, many persons interested in the issue of controlling school property and the exercise of First Amendment rights were very interested when the Supreme Court of the United States accepted a petition to consider the case of the State of Washington v. Waldemer Oyen, et al. [408 U.S. 933, 92 S. Ct. 2846 (1972)].

The Oyen case, or the case of the "Sehome Eight" as it is sometimes referred to, tested the validity of a State of Washington statute enacted specifically to protect schools from intrusive influences deemed by school authorities to be detrimental to their welfare or to the appropriate functioning of the public schools. The statute contains the following provisions:

> Vagrancy. Every . . . person--except a person enrolled as a student in or parents or guardians of such students or persons employed by such school or institution, who, without a lawful purpose therefore, willfully loiters about the building or buildings of any public or private school or institution of higher learning or the public premises adjacent thereto--is a vagrant, and shall be punished by

imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars.

The facts in the case were never in dispute. On November 25, 1968, eight students of Western Washington State College sought permission from the principal of Sehome High School in Bellingham, Wash., to distribute anti-war and anti-draft literature at the school.

The spokesman for the student group, members of a campus organization called the Radical Coalition, was advised by the Sehome High School principal that approval from the superintendent of the school district was required for the distribution of literature, according to school board policy. Notwithstanding this admonition, the eight students proceeded to a covered walkway adjacent to the bus loading area and handed out copies of two pamphlets to high school students as they got off the school bus. The eight college students were on school property but not in the school building.

Within minutes, the principal warned the students that they were acting contrary to the school board regulation and the law. After the third warning, police were summoned. A police officer advised the pamphleteers that their activity violated state law and that failure to leave immediately would lead to arrest. About 150 high school students witnessed the incident. Although some of the high school students booed and hissed, there was no violence. The scene took place between 7:30 and 8 a.m. prior to the first class hour.

Without resistance, the college students accompanied the policeman to the city jail, where each was booked on a charge of vagrancy and released on his personal recognizance. The police report noted that the defendants were at all times orderly and non-violent. They did not interfere with passage of the high school students from the bus into the school. Their activities consisted of distributing pamphlets and talking briefly with the high school students.

All eight college students were found guilty of vagrancy in Whatcom District Court on January 6, 1969. Appealing their case to the Superior Court of Whatcom County, they were found guilty six months later, with each one fined $35 and costs. Appeals were then made to the Supreme Court of the State of Washington, where on March 15, 1971, the conviction was affirmed by a 9-0 decision. Appeal to the United States Supreme Court followed.

The State of Washington statute defined as a loiterer anyone loitering who is "not a person enrolled as a student in or parent or guardian of such student or person employed by such school or institution." The defendants argued that the vagrancy statute was "unconstitutional" on its face because it "violated the First and Fourteenth Amendments to the United States Constitution." Even if generally constitutional, they contended, it violated the defendants' First Amendment rights of freedom of speech, press, and assembly and the due process clause of the Fourteenth Amendment by being vague and overly broad.

The prosecution proceeded on the theory that the "Sehome Eight" defendants had acted "without a lawful purpose" in three respects:

- Distributing literature that counseled violation of the Draft Act.
- Encouraging disrespect for the law.
- Violating the school district regulation requiring prior approval for the distribution of materials to students on school premises.

On July 5, 1972, the U.S. Supreme Court handed down its decision in what is known as memorandum form. This means that no opinion was actually delivered. The Court only directed that the convictions were to be vacated and the case remanded to the Supreme Court of Washington for further consideration in light of two other decisions reached by the U.S. Supreme Court a few weeks earlier.

The Supreme Court of the State of Washington reconsidered the case on August 2, 1972. This court, according to Associate Justice Hugh J. Rosellini, could have scheduled a rehearing of arguments or ordered a dismissal of the charges against the defendants. Instead, it took a third course and remanded the case to the Superior Court in Whatcom County for further consideration, directing that court to award the appellants $100 for costs.

Neither the U.S. Supreme Court nor the Supreme Court of the State of Washington has actually declared the State of Washington vagrancy statute unconstitutional, but the legal effect of these actions may be tantamount to that. There is no indication that the Whatcom County Prosecuting Attorney plans any further action in the case. It may, therefore, be considered closed. Whether the legislature will attempt to write a new statute is a matter of speculation.

Looking at the decisions in the two cases to which the U.S. Supreme Court referred the lower courts in the Oyen decision, the court appears to have decided the case on the basis that the Washington statute on vagrancy was either overly broad, vague, or discriminatory in its definition of "loiterers," thereby seeking to bar all persons so defined from even the public premises adjacent to a school at any and all times.

The first of the two cases referred to by the U.S. Supreme Court was the Police Department of the City of Chicago v. Mosley [408 U.S. 92, 92 S.Ct. 2286 (1972)]. In this case, the Supreme Court unanimously affirmed the decision of the Court of Appeals that the conviction of Earl Mosley, a federal postal employee, for picketing a public high school in violation of a Chicago disorderly conduct ordinance was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court found the ordinance unconstitutional because it "makes an impermissible distinction between labor picketing and other peaceful picketing."

The ordinance excluded from prohibited conduct "the peaceful picketing of any school involved in a labor dispute." The decision was therefore based more upon a denial of equal protection of the law than it was upon restraint of free speech or expression. The difficult issue of deciding whether the individual's rights to free speech should outweigh society's interest in promoting public education might never have been reached, however, because Mosley's picketing was not disruptive of school activity.

The other case upon which the U.S. Supreme Court placed major reliance in Oyen, was Grayned v. City of Rockford [408 U.S. 104, 92 S. 35. 2294, (1972)]. Here, the Court dealt with a conviction under both an anti-picketing and anti-noise ordinance. The appellant, Richard Grayned, was a brother of several students enrolled in a Rockford, Ill., high school although not a student there himself. He had participated peacefully in a demonstration on a sidewalk located about 100 feet from the school. The evidence was contradictory as to whether the picketers or the police had made the greater noise and as to the degree to which school activity had been disrupted. The Supreme Court held that the anti-picketing ordinance was unconstitutional for the same reason as in Chicago v. Mosley, namely, that the ordinance was unfairly discriminatory.

On the other hand, the Court upheld Grayned's conviction under the anti-noise ordinance. The provision of the Rockford anti-noise ordinance was:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . . .

The Court supported the ordinance, holding it to be sufficiently clear and specific so as not to be void because of vagueness. Its application, even in cases where disruption had not in fact occurred, was upheld; because the principle of imminence involved in the "clear and present danger" doctrine of Justice Oliver Wendell Holmes in relation to physical harm could be extended to noise, when that would interfere with the peace and good order of the school.

Writing for the Supreme Court, Justice Marshall referred to Coates v. Cincinnati [402 U.S. 611 (1971)] in which an ordinance (punishing sidewalk assembly of three or more persons who "conduct themselves in a manner annoying to persons passing by . . .") was declared unconstitutional. The Court, in that instance, held that the language was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance." In the Rockford case, the Court determined that the requirements of the anti-noise ordinance were clearly spelled out.

Justice Marshall then focused specifically upon the need to accommodate First Amendment rights to the special characteristics of the school environment which had been the central issue in Tinker v. Des Moines Independent Community School District [393 U.S. 508, 89 S.Ct. 733, (1969)]:

> We would be ignoring reality if we did not recognize that the public schools in a community are important institutions and are often the focus of significant grievances. Without interfering with normal school activities, daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administration, and students . . . . On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, making study impossible, block entrances, or incite children to leave the schoolhouse . . . . The [Rockford] anti-noise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty audience enters and leaves the school.

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Peaceful Activity Not Prohibited

The U.S. Supreme Court has consistently said that peaceful activity near a school or on school premises (but not, of course, inside buildings) that does not interfere with classroom or other school activities, whether by students or others, cannot be prohibited under a loitering statute. The Court, we might reasonably infer, indicates that loitering is limited in its definition to one or a small number of persons. A large assembly outside a school would probably be another matter. What the Court would say, for example, to convictions for disorderly conduct of participants in a large crowd chanting exhortations to students not to enter school prior to the beginning of the school day when immediate interference with classwork would not be at issue can only be guessed at.

Conclusion

From this analysis, the current status of the law concerning the right of persons not connected with school programs or activities to exercise their freedom of expression and assembly in the immediate vicinity of schools, insofar as they relate to picketing, leafletting, speech, and noise, may be summarized as follows:

- The secondary school classroom and, for that matter, classrooms and premises of public schools at all levels are under the control of the State, which has the power to regulate the use of such premises in accordance with the purpose for which each such institution is established. Regulations must, however, be reasonable, fair, and non-discriminatory as between users of the same kind.

- Interruptions of the educational process by outsiders, either through actual invasion of the classroom or facilities or by activity which deliberately interferes with their proper use, may be prohibited.

- While peaceful picketing will be allowed, occupations of buildings to shut them down, the invasion of classrooms, and, for that matter, the deliberate making of noise which interferes with classes, even when originating on non-school adjacent premises, will not be permitted.

- School officials may specify under what conditions speakers, picketers, pamphleteers, or other demonstrators may function within a school building. During the school day, moreover, learning activities may be protected from interference originating on public premises adjacent to school property when such interferences are intentional.

- Persons seeking to exercise their rights to free speech or peaceable assembly prior to or after school hours in ways which are not actually or imminently violent may do so on public premises near school facilities even when the place of such activity is actually school district property. Such activity inside the door of a school building, however, would probably be prohibited.

- Denial of access to school property by school authorities has usually been held to be permissible if the terms of denial are carefully and clearly drawn, but care must be taken to assure that the statute or rule clearly identifies the persons affected and the conditions under which their rights are limited; the law or regulation will be strengthened if the reason for the limitations and the interest protected are described as well.

It is to be expected that the Supreme Court and other appellate courts will continue to act vigorously to protect the First Amendment rights of all citizens and that schools will often be the focus of the exercise of these rights. On the basis of the legal opinions reviewed, however, it seems equally certain that the public interest in assuring the orderly education of the young will also continue to be given full and adequate protection by the courts.

The contributing editor of this Legal Memorandum was Paul E. Herbold, associate professor at Western Washington State College in Bellingham, Washington.

A Legal Memorandum

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